

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF LOUISIANA  
MONROE DIVISION**

THE STATE OF LOUISIANA,  
By and through its Attorney General,  
JEFF LANDRY;

Civil Action No. 3:21-cv-03970

THE STATE OF MONTANA, By and  
through its Attorney General, AUSTIN  
KNUDSEN;

District Judge Terry A. Doughty

THE STATE OF ARIZONA, By and  
through its Attorney General, MARK  
BRNOVICH;

Magistrate Judge Kayla D. McClusky

THE STATE OF ALABAMA, By and  
through its Attorney General, STEVE  
MARSHALL;

THE STATE OF GEORGIA, By and  
through its Attorney General,  
CHRISTOPHER M. CARR;

THE STATE OF IDAHO, By and  
through its Attorney General,  
LAWRENCE G. WASDEN;

THE STATE OF INDIANA, By and  
through its Attorney General,  
THEODORE M. ROKITA;

THE COMMONWEALTH OF  
KENTUCKY, By and through its  
Attorney General, DANIEL CAMERON;

THE STATE OF MISSISSIPPI, By and  
through its Attorney General, LYNN  
FITCH;

THE STATE OF OHIO, By and through  
its Attorney General, DAVE YOST;

THE STATE OF OKLAHOMA, By and

through its Attorney General, JOHN M. O'CONNOR;

THE STATE OF SOUTH CAROLINA,  
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ALAN WILSON;

THE STATE of TENNESSEE, By and  
through its Attorney General,  
HERBERT H. SLATERY III;

THE STATE OF UTAH, By and through  
its Attorney General, SEAN D. REYES;

THE COMMONWEALTH OF  
VIRGINIA, By and through its Attorney  
General, JASON S. MIYARES;

THE STATE OF WEST VIRGINIA, By  
and through its Attorney General,  
PATRICK MORRISEY;

PLAINTIFFS,

v.

XAVIER BECERRA, in his official  
capacity as Secretary of Health and  
Human Services, et al.,

THE U.S. DEPARTMENT OF HEALTH  
AND HUMAN SERVICES;

CHIQUITA BROOKS-LASURE, in her  
official capacity of Administrator of the  
Centers for Medicare & Medicaid  
Services;

CENTERS FOR MEDICARE &  
MEDICAID SERVICES;

DEFENDANTS.

**MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO  
FILE SECOND AMENDED, SUPPLEMENTAL, AND RESTATED  
COMPLAINT**

The States of Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Kentucky, Mississippi, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Virginia, and West Virginia (“Plaintiff States”) respectfully move this Court for an order under Rule 15 of the Federal Rules of Civil Procedure granting their motion for leave to file a SECOND AMENDED, SUPPLEMENTAL, AND RESTATED COMPLAINT against Defendants. Pursuant to Fed. R. Civ. P. 15(a)(2), Defendants oppose the Motion.

The new complaint seeks to add as plaintiffs the State of Tennessee and Commonwealth of Virginia. The new complaint also addresses the Defendants’ January 25, 2022, issuance of new guidance (“January 25 guidance”) applying the vaccine mandate challenged in Plaintiff States’ first Amended Complaint to State Survey Agency and Accrediting Organization Surveyors. CMS, QSO-22-10-ALL, *Vaccination Expectations for Surveyors Performing Federal Oversight*.

**BACKGROUND**

On November 5, 2021, CMS published an interim final rule (“IFR”) requiring vaccination of staff of certain Medicare and Medicaid providers and suppliers. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccinations, 86 Fed. Reg. 61555 (Nov. 5, 2021). Plaintiff States, less Kentucky, Ohio, Tennessee, and Virginia, filed this action challenging the IFR on multiple grounds on November 15, 2021, and an amended complaint, adding the Commonwealth of Kentucky and State of Ohio as plaintiffs on November 22, 2021.

Dkt. 1; Dkt. 11. This Court granted Defendants an extension of time to respond to the Complaint on January 12, 2022, setting the new response deadline as February 8, 2022. Dkt. 43. On January 25, Defendants extended the reach of the vaccine mandate in the IFR to certain state employees by issuing the January 25 guidance, impacting additional state interests. Plaintiff States now respectfully request this Court's leave to file their Second Amended, Supplemental, and Restated Complaint to address this new development and to add additional interested sovereign parties.

### **ARGUMENT**

Justice requires that the Court provide Plaintiff States their requested leave because this timely request responds to a change of circumstances generated by Defendants and allows the inclusion of two additional plaintiffs in this forum, benefitting judicial efficiency. "The court should freely give leave" to amend pleadings "when justice so requires." Fed. R. Civ. P. 15(a)(2). To deny a motion to amend, the court must have a "substantial reason" considering such factors as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ... and futility of the amendment." *Marucci Sports, LLC v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (quoting *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 994 (5th Cir. 2005)). None of these deficiencies exist here.

The January 25 guidance is a new agency action incorporating and extending the challenged CMS vaccine mandate against an additional category of state

employees. Plaintiff States are requesting leave to file their Second Amended, Supplemental, and Restated Complaint the week after Defendants issued that January 25 guidance, so there can be no doubt as to this Motion's timeliness. As Defendants are responsible for this new guidance, and the guidance is built upon the IFR already before the Court in this case, justice requires that Plaintiff States be able to address this new, connected agency action. Further, as noted above, Plaintiff States seek to add two additional sovereign states as plaintiffs to vindicate their own interests regarding the state employees targeted by the January 25 guidance and the IFR, and doing so here avoids duplicative litigation in other fora. This benefits judicial economy without prejudicing Defendants, who have not yet answered the Complaint and have, with Plaintiff States' consent, filed for another extension of time to do so. Dkt. 48. Indeed, it is Plaintiff States whose interests will be prejudiced if denied the ability to seek proper redress for the full extent of their injuries as Defendants persist in changing the regulatory terrain. Justice will, therefore, be served by this Court giving Plaintiff States leave to file their Second Amended, Supplemental, and Restated Complaint, and no "substantial reason" exists to permit the denial of such leave, so this Court should grant Plaintiff States' Motion.

## CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff States Motion for Leave to file their Second Amended, Supplemental, and Restated Complaint.

Dated: February 4, 2022

Respectfully Submitted,

By: /s/Elizabeth Murrill

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I presented the above and foregoing for filing and uploading to the CM/ECF system which will send electronic notification of such filing to all counsel of record.

Alexandria, Louisiana, this 4<sup>th</sup> day of February, 2022.

/s/Elizabeth Murrill  
OF COUNSEL